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In the

SUPREME COURT OF THE UNITED STATES

W.R. GRACE & CO.—CONN. and
CHRYSLER MOTORS CORPORATION,
Petitioners.

v.

WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

JURISDICTION 1

STATEMENT 1

I. Washington's Taxes on Extracting, Manufacturing, and Selling 1

II. Prior Litigation Over the Extracting, Manufacturing, and Selling B&O Taxes. 3

A. *Tyler Pipe*. 3

B. *National Can II* 4

C. *American National Can* and *Digital Equipment* 5

III. Procedural History of This Case 6

REASONS WHY THE PETITION SHOULD BE DENIED 11

I. The Court Lacks Jurisdiction Because There Is No Final Judgment. 11

II. Retroactive Application of the 1987 Two-Way Credits Does Not Violate Due Process. 13

A. The Court Below Erred in Giving *Tyler Pipe* Retroactive Application. 13

B. Petitioners' Argument that Retroactive Application of the Two-Way Credits Fails to Provide Them "Meaningful Backward-Looking Relief" Is Meritless 13

C. Petitioners' "Bait and Switch" Procedural Due Process Argument Also Is Meritless 17

D. Petitioners' Substantive Due Process Argument Also Is Meritless. 21

III. The Apportionment Question Petitioners Pose Is So Explicitly Foreclosed by Prior Decisions of This Court As To Leave No Room for Real Controversy.....23

CONCLUSION.....29

APPENDIX.....1a

TABLE OF AUTHORITIES

Cases

American Mfg. Co. v. St. Louis,
250 U.S. 459 (1919)..... 24, 26

American Nat'l Can Corp. v. Department of Rev.,
114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990)..... 5, passim

Aponaug Mfg. Co. v. Stone,
314 U.S. 577 (1941), *aff'g per curiam* 190 Miss. 805, 1 So.2d 763 (1941) 26

Armco Inc. v. Hardesty,
467 U.S. 638 (1984)..... 16

Associated Indus. v. Lohman,
511 U.S. 641 (1994)..... 14, 18

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) 16

Benjamin Franklin Thrift Stores, Inc. v. Henneford, 187 Wash. 472,
60 P.2d 86 (1936)..... 19

Bond v. Burrows, 103 Wash. 2d 153,
690 P.2d 1168 (1984)..... 19

Central Greyhound Lines v. Mealey,
334 U.S. 653 (1948)..... 27

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971)..... 4

Chicago Bridge & Iron Co. v. Department of Rev., 98 Wash. 2d 814, 659 P.2d 463, *appeal dismissed for want of a substantial federal question*, 464 U.S. 1013 (1983) 26

City of Winchester v. American Woodmark Corp., 252 Va. 98, 471 S.E.2d 495 (1996) 27, 28

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 26, 27

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11, 12

Department of Treasury v. Allied Mills, Inc., 318 U.S. 740 (1943), *aff'g per curiam* 220 Ind. 340, 42 N.E.2d 34 (1942) 26

Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941) 26

Digital Equip. Corp. v. Department of Rev., 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997) ..... 6, passim

Evco v. Jones, 409 U.S. 91 (1972) 28

Field Enterprises v. Washington, 352 U.S. 806 (1956), *aff'g per curiam* 47 Wash. 2d 852, 289 P.2d 1010 (1955) 26

Flynt v. Ohio, 451 U.S. 619 (1981) 11, 12

Freeman v. Hewit, 329 U.S. 249 (1946) 16

General Motors Corp. v. City & County of San Francisco, 69 Cal. App. 4th 448, 81 Cal. Rptr. 544 (1999) 14, 23

General Motors Corp. v. Washington, 377 U.S. 436 (1964) 25

Hagen v. Utah, 510 U.S. 399 (1994) 25

Haring v. Prosise, 462 U.S. 306 (1983) 25

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 8, 18

Hathorn v. Lovorn, 457 U.S. 255 (1982) 11

Heck v. Humphrey, 512 U.S. 477 (1994) 25

Heisler v. Thomas Collier Co., 260 U.S. 245 (1922) 26

Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) 26

International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1943) 26

J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) 28

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 8

Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936) 19

Lacoste v. Department of Conservation, 263 U.S. 545 (1924) 26

M & Associates, Inc. v. City of Irondale, 723 So.2d 592 (Ala. 1998) 27, 28

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) ..... 13, passim

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 16

National Can Corp. v. Department of Rev., 105 Wash. 2d 327, 732 P.2d 134 (1986) (*National Can I*) 4

National Can Corp. v. Department of Rev., 109 Wash. 2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, 486 U.S. 1040 (1988) (*National Can II*) ..... 4, passim

Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) 17, 18, 21

Nipges v. Thornton, 119 Wash. 464, 206 P. 17 (1922) 19

Norton Co. v. Department of Rev., 340 U.S. 534 (1951) 26

Oklahoma Tax Commission v. *Jefferson Lines*, 514 U.S. 175 (1995) ..... 17, passim

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 26

Reich v. Collins, 513 U.S. 106 (1994) 17, 18, 21

Reynolds Metals Co. v. Washington, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965) 24, 26

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 18

Simpson v. State, 26 Wash. App. 687, 615 P.2d 1297, *review denied*, 94 Wash. 2d 1022 (1980) 19

Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) 26

Standard Pressed Steel Co. v Department of Rev., 419 U.S. 560 (1975) 25

Stone v. Stapling Machines Co., 220 Miss. 470, 71 So. 2d 205, *appeal dismissed for want of a substantial federal question*, 348 U.S. 802 (1954) 26

Street v. New York, 394 U.S. 576 (1969) 25

Tyler Pipe Indus., Inc. v. Department of Rev., 96 Wash. 2d 785, 638 P.2d 1213, 1216 (1982) 20

Tyler Pipe Indus., Inc. v. Department of Rev., 105 Wash. 2d 318, 715 P.2d 123 (1986) 4

Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev., 483 U.S. 232 (1987) ..... 2, passim

United States v. Carlton, 512 U.S. 26 (1994) 22

United States v. Hemme, 476 U.S. 558, 568-71 (1986) 22

United States v. Stauffer Chem. Co., 464 U.S. 165 (1984) 25

Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 26

Westinghouse Electric Corp. v. King, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed for want of a substantial federal question*, 470 U.S. 1075 (1985) 26

Woodruff v. Parham, 8 Wall. 123 (1868) 26

Statutes

1987 Wash. Laws, 2d Ex. Sess., ch. 3 5

Wash. Rev. Code § 82.04.230 1

Wash. Rev. Code § 82.04.240 1

Wash. Rev. Code § 82.04.250 1

Wash. Rev. Code § 82.04.270 1

Wash. Rev. Code § 82.04.4286 19

Wash. Rev. Code § 82.04.440(2) 2

Wash. Rev. Code § 82.04.440(4) 2

Wash. Rev. Code § 82.04.440(5) 17

Wash. Rev. Code § 82.04.440(2)(1984) 3

Wash. Rev. Code § 82.32.150 19

Wash. Rev. Code § 82.32.180 19

Wash. Rev. Code § 82.98.030 19

28 U.S.C. § 1257 24

28 U.S.C. § 1257(a) 1, 11

Rules

Wash. Admin. Code § 458-20-19301(9) 15

Wash. Admin. Code § 458-20-19301(8)(b) 15

Supreme Court Rule 10(b) 27

Wash. Super. Ct. Civ. R. 54(b) 8

Treatises

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 94 (7th ed. 1993) 11

JURISDICTION

This Court lacks jurisdiction over the petition because the decision of the Supreme Court of Washington is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257(a). We discuss this jurisdictional issue at page 11, *infra*.

STATEMENT

We begin with a brief description of the taxes at issue in this case and prior litigation concerning those taxes. We will then discuss the procedural history of this case.

I. Washington's Taxes on Extracting, Manufacturing, and Selling.

This case concerns Washington's business and occupation (B&O) taxes on the activities of extracting, manufacturing, and selling. The extracting and manufacturing taxes are imposed on the activities of extracting or manufacturing in Washington. The measure of both taxes is the "value of the products" extracted or manufactured in Washington. Wash. Rev. Code §§ 82.04.230, .240. B&O taxes also are imposed on the activity of selling, either at wholesale or retail. The measure of the selling taxes is the "gross proceeds of sales" in Washington. Wash. Rev. Code §§ 82.04.250, .270.

It is important to understand that the extracting, manufacturing, and selling B&O taxes are imposed only when those activities take place in Washington. For example, a business located in Washington does not pay any manufacturing B&O tax with respect to products it manufactures in another state or any selling B&O tax with respect to products it sells in another state. Washington does not have jurisdiction to tax extracting, manufacturing, or selling activities that take place in other states. In this respect, the B&O taxes differ from net income taxes that include within their measure all of a business's net income from every jurisdiction derived from every business activity.

The B&O tax system now includes the two-way system of credits suggested by this Court in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 246 (1987). Under the two-way credit system, all persons engaged in extracting or manufacturing activities in Washington must pay an extracting or manufacturing B&O tax. All persons engaged in selling in Washington must pay a retailing or wholesaling B&O tax.

Under the two-way credit mechanism, both local and interstate businesses are entitled to a tax credit against Washington's selling tax. The Washington B&O tax imposed on the sale of a product may be reduced by the amount of any extracting or manufacturing tax paid to Washington or another jurisdiction on the activities of extracting or manufacturing the product. Wash. Rev. Code § 82.04.440(2).

A credit also is available for Washington extractors or manufacturers selling in interstate commerce. This is a credit against Washington's extracting or manufacturing tax. The Washington tax imposed on the activities of extracting or manufacturing a product may be reduced by the amount of any selling tax paid to another jurisdiction on the activity of selling the product. This credit is available only for selling taxes paid to jurisdictions other than Washington. Wash. Rev. Code § 82.04.440(4).[1]

The two-way credit system ensures that interstate and local businesses will bear the same tax burden on their extracting, manufacturing, and selling activities.

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[1] Citing the opinion of the court below, petitioners state that other jurisdictions' taxes must be "identical" to Washington's taxes to qualify for the two-way credits. Pet. 4. That is neither an accurate paraphrase of the court's opinion nor an accurate description of Washington's statute. Petitioners' description at pages 4-6 of the petition of the requirements for claiming credits also is misleading. We discuss this point at page 15, *infra*.

II. Prior Litigation Over the Extracting, Manufacturing, and Selling B&O Taxes.

A. *Tyler Pipe*.

Beginning in 1984, taxpayers brought over 300 actions challenging the extracting, manufacturing, and selling B&O taxes on Commerce Clause grounds. Petitioners W.R. Grace & Co. (Grace) and Chrysler Motors Corporation (Chrysler) were among a group of 71 appellants in *Tyler Pipe*, 483 U.S. 232 (1987). At that time, the B&O tax system did not have the current two-way credit system. Instead, there was a "multiple activities exemption," which provided that "[p]ersons taxable under [the Washington retailing or wholesaling taxes] shall not be taxable under [the Washington extracting or manufacturing taxes] with respect to extracting or manufacturing of the products so sold." Wash. Rev. Code § 82.04.440(2) (1984). The former multiple activities exemption thus applied only to local commerce.

In *Tyler Pipe*, this Court held "Washington's multiple activities exemption invalid." 483 U.S. at 253. The multiple activities exemption was defective because it applied only if a business paid a Washington selling B&O tax. It did not apply if a similar selling tax was paid to another state. This violated the principle of internal consistency—"that is the [tax] must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.* at 247.

If every state imposed the extracting, manufacturing, and selling taxes at issue in *Tyler Pipe*, an interstate manufacturer would pay multiple taxes. For example, an interstate manufacturer would pay a manufacturing B&O tax to Washington and a selling gross receipts tax to another state because the multiple activities exemption would not apply. A local manufacturer would only pay Washington's selling B&O tax because the multiple activities exemption would apply to excuse the manufacturing B&O tax.

An integral part of *Tyler Pipe* was the Court's explanation of how to repair the system. Washington could make the multiple activities exemption internally consistent by extending equivalent benefits to interstate commerce. According to the Court: "The parallel condition precedent for a valid multiple activities exemption eliminating exposure to the burden of a multiple tax on manufacturing and wholesaling would provide a credit against Washington tax liability for wholesale taxes paid by local manufacturers to any State, not just Washington." *Id.* at 246. This credit prescription was repeated later in the opinion when the Court stated that "an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to another State would presumably cure the discrimination." *Id.* at 249.

A second significant holding in *Tyler Pipe* concerned apportionment. This Court affirmed the Washington Supreme Court's holding that the selling B&O taxes paid by Tyler Pipe, Grace, Chrysler, and many other petitioning taxpayers were fairly apportioned. *Id.* at 248-51.

B. *National Can II.*

Washington argued in *Tyler Pipe* that any decision adverse to the State should have only prospective application. Brief for Appellee at 44-48, Tr. of Oral Arg. at 44, *Tyler Pipe* (Nos. 85-1963 and 85-2006). Acknowledging the argument, this Court vacated the Washington Supreme Court's judgments in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wash. 2d 318, 715 P.2d 123 (1986), and *National Can Corp. v. Department of Rev.*, 105 Wash. 2d 327, 732 P.2d 134 (1986) (*National Can I*), and remanded for further proceedings not inconsistent with its opinion. 483 U.S. at 251-53.

On remand, the Washington Supreme Court held this Court's discrimination holding applied purely prospectively, employing the federal civil retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *National Can Corp. v. Department of Rev.*, 109 Wash. 2d 878, 749 P.2d 1286, *appeal*

dismissed, cert. denied, 486 U.S. 1040 (1988) (*National Can II*). The *Tyler Pipe* plaintiffs therefore were denied any refunds for taxable activities before June 23, 1987, the date of this Court's decision. The *Tyler Pipe* decision was purely prospective because the decision did not apply retroactively to the litigants in that case.

After the ruling in *National Can II*, hundreds of other taxpayers dismissed their refund claims for tax periods before the *Tyler Pipe* decision.

C. *American National Can* and *Digital Equipment.*

Tyler Pipe was handed down on June 23, 1987. Seven weeks later, on August 11, 1987, Washington enacted the two-way credit system suggested by this Court in *Tyler Pipe* to eliminate the constitutional defects of the multiple activities exemption. Wash. Rev. Code § 82.04.440; 1987 Wash. Laws, 2d Ex. Sess., ch. 3 (App. 1a-4a).

Under section 3 of the 1987 law, if a court determined that relief was appropriate regarding the former multiple activities exemption for any periods before the law's August 12, 1987 effective date, refunds based on the two-way credits were to be the exclusive relief available to taxpayers. Since *Tyler Pipe* was purely prospective, no relief was appropriate under section 3 for any periods before that decision. (App. 4a).

In *American Nat'l Can Corp. v. Department of Rev.*, 114 Wash. 2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), a large group of corporations, including Grace and Chrysler, next challenged the 1987 two-way credit law, as well as its retroactive application to the seven-week "interim period" after the *Tyler Pipe* decision from June 23 through August 11, 1987. They claimed the 1987 law discriminated against interstate commerce and violated principles of equal protection and due process of law. *Id.* at 241. In *American Nat'l Can*, the Washington Supreme Court upheld the constitutionality of the 1987 two-way credit law and applied it retroactively to the seven-week interim period.

In *Digital Equip. Corp. v. Department of Rev.*, 129 Wash. 2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273 (1997), the Washington Supreme Court reaffirmed its holding in *American Nat'l Can* that retroactive application of the two-way credits to the seven-week interim period was constitutional. In *Digital*, five members of the court questioned the court's earlier decision in *National Can II* that *Tyler Pipe* should be given prospective application. Three justices, in the lead opinion, concluded that the court in *National Can II* erroneously addressed an issue that was not left open by the mandate. 129 Wash. 2d at 183-89, 194, 916 P.2d at 936-38, 941. Two other justices disagreed with this conclusion, but stated in dictum that they disagreed with the prospectivity holding in *National Can II*. *Id.* at 195 & n.76, 916 P.2d at 942 & n.1. Four justices disagreed with the lead opinion and would have followed *National Can II*. They concluded that departing from *National Can II* would result in selective prospectivity, which this Court has rejected. *Id.* at 205-10, 916 P.2d at 947-49.

Although the *Digital* court was divided over the prospective application of *Tyler Pipe*, the justices agreed that retroactive application of credits for gross receipts taxes paid to other jurisdictions was a constitutional way to correct any discrimination caused by the multiple activities exemption.[2]

III. Procedural History of This Case.

In July 1993, the Washington State Department of Revenue (Department) issued three final tax assessments against Grace, covering tax periods from January 1980 through December 1990, for unpaid taxes and interest. Instead of paying the assessments, Grace filed in the superior court a complaint for declaratory judgment, injunctive relief, and damages against the Governor, the Attorney General, the Director of the Department, and the Department. The

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[2] A more detailed summary of the *Digital* case, including the three opinions of the Washington Supreme Court, appears at pages 6-10 of the Department's conditional cross-petition in Supreme Court No. 99-233.

complaint alleged that, as to taxes assessed for periods through June 23, 1987, the defendants were seeking to collect taxes this Court had declared in *Tyler Pipe* to be in violation of the Commerce Clause. The complaint further alleged that, as to taxes assessed for periods after June 23, 1987, the defendants were seeking to collect taxes that, despite the 1987 amendment of Wash. Rev. Code § 82.04.440, continued to violate the Commerce Clause. The Department asserted a counterclaim for the unpaid taxes, interest, and penalties. Grace later voluntarily dismissed the three individual defendants.

In February 1994, the Department issued tax assessments against Chrysler for unpaid taxes and interest covering tax periods from January 1984 through June 1988. In July 1994, while its administrative appeal of the assessments was still pending, Chrysler filed in the superior court a complaint similar to the complaint in *Grace* for declaratory judgment, injunctive relief, and damages against the Attorney General, the Director of the Department, and the Department. Chrysler later withdrew its administrative appeal and filed an amended complaint seeking declaratory and injunctive relief only against the Department, alleging Commerce Clause violations similar to those alleged in *Grace*. As in *Grace*, the Department asserted a counterclaim for the unpaid taxes, interest, and penalties.

The taxpayers and the Department filed cross-motions for partial summary judgment in both actions. The Department's motions sought dismissal of all claims of the taxpayers with prejudice on the basis of issue preclusion. The taxpayers' motions sought orders declaring (1) that *Tyler Pipe* applied retroactively, (2) that taxes imposed for any periods before June 23, 1987 were "void and unenforceable," (3) that taxes imposed for any later periods discriminated against interstate commerce, and (4) that neither claim preclusion nor issue preclusion barred the taxpayers' requested relief.

In opposing the taxpayers' motions, the Department argued, among other things, that the *Tyler Pipe* discrimination

holding was not applied to the litigants in that case, and that Grace and Chrysler were therefore urging as a choice-of-law rule a form of selective prospectivity precluded by *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

The trial court issued memorandum opinions in the two actions, which (1) denied the Department's motions for partial summary judgment based on issue preclusion, (2) denied the taxpayers' motions except for granting them partial summary judgment that *Tyler Pipe* applied retroactively, and (3) *sua sponte* granted the Department partial summary judgment that the two-way credit law, when applied retroactively and prospectively to all the assessment periods, was constitutional.

Two months later, the trial court entered what purported to be "final judgments" pursuant to Wash. Super. Ct. Civ. R. 54(b) based on its memorandum opinions. (Pet. App. 72a-91a). Both the Department and the taxpayers filed motions for reconsideration, asking the trial court to reconsider its "final judgments." The taxpayers filed appeals to the Washington Supreme Court in July 1996, long before the trial court heard argument on the parties' motions for reconsideration. The Washington Supreme Court on its own initiative ordered the two cases consolidated for purposes of appellate review and granted the taxpayers' motion for a stay until the trial court resolved the motions for reconsideration.

While the parties' motions for reconsideration were still pending in the trial court, the Washington Supreme Court issued its decision in *Digital*. The trial court then requested additional briefing on the effect of that decision in *Grace* and *Chrysler*. In a joint letter opinion and order issued in December 1996 in *Grace* and *Chrysler*, the trial court eventually denied the parties' motions for reconsideration and concluded that *Digital* confirmed its earlier ruling that *Tyler Pipe* applies retroactively. (Pet. App. 60a-66a) In January 1997, the Department filed timely appeals to the Washington

Supreme Court, seeking review of the joint letter opinion and order and the two "final judgments" entered in June 1996.

At that point the trial court still had not resolved the Department's cross-claims in *Grace* and *Chrysler*. After determining the amounts of the Department's judgments against Grace and Chrysler, which involved deciding the amounts of credits to which they were entitled, the trial court entered in June 1997 final summary judgment orders in the two cases. In substance, the trial court awarded Chrysler $125,000 in injunctive relief based on the two-way credits. Since Grace did not pay any gross receipts taxes qualifying for the credits, it received no injunctive relief. (Pet. App. 67a-71a; Cross-Pet. App. 1a-5a)

In July 1997, the Department filed timely supplemental appeals to the Washington Supreme Court in both cases, seeking review of the June 1997 final summary judgment orders. Neither Grace nor Chrysler appealed from those final orders.

Although *Grace/Chrysler* and *Buffelen/Anheuser-Busch* were separately briefed and argued, the Washington Supreme Court issued a single opinion to resolve the two consolidated appeals. In its opinion, the court affirmed three key rulings of the trial court. First, the court decided that *Tyler Pipe* applies retroactively based only on "principles of stare decisis," concluding that a majority of the court had so held in *Digital*. 137 Wash. 2d at 592-93, 973 P.2d at 1017 (Pet. App.12a-13a). Second, the current B&O tax system with its two-way credit system complies with all Commerce Clause requirements. *Id.* at 596-98, 973 P.2d at 1018-19 (Pet. App. 16a-18a). Third, retroactive application of the two-way credits to cure the discrimination caused by the former multiple activities exemption did not violate due process. *Id.* at 598-603, 973 P.2d at 1019-22 (Pet. App. 18a-24a).

The court did not decide, however, several other federal and state law questions raised by the Department. Instead, it "preserv[ed]" those issues "for trial court resolution on

remand[.]" *Id.* at 584, 973 P.2d at 1013 (Pet. App. at 2a). Although the court declined to decide those issues, the court commented that they were "plainly the most significant and meritorious" of the issues presented in the Department's cross-appeals. *Id.* at 591, 973 P.2d at 1016 (Pet. App. 10a).

The court noted in particular that "Grace and Chrysler were parties in both *National Can I/Tyler Pipe* and *American Nat'l Can*." *Id.* It explained that "[t]he former case rejected the taxpayers' apportionment argument" and that *American Nat'l Can* both "noted the resolution of the apportionment claim in *Tyler Pipe*" and "rejected taxpayers' constitutional challenges to Washington's amended B&O tax scheme." *Id.* It further noted that the taxpayers in *American Nat'l Can*, including Grace and Chrysler, "conceded Washington's B&O tax is fairly apportioned." *Id.* at 591 n.7, 973 P.2d at 1016 n.7 (Pet. App. 10a). In conclusion, it stated:

> Thus, with respect to many of the issues raised by the taxpayers, they may well have had their day in court on those issues, although the taxpayers assert that the United States Supreme Court jurisprudence on taxation and the Commerce Clause requires these issues to be re-examined.

Id. at 591, 973 P.2d at 1016 (Pet. App. 10a).

The court explained that "given our disposition of this case" (remand to the trial court for further action consistent with its opinion), the court deemed it "unnecessary at this time" to address the issue preclusion questions "decided by the trial court in *Grace/Chrysler*." *Id.* at 592 n.8, 973 P.2d at 1017 n.8 (Pet. App. 11a). The court underscored, however, that its review of these issues was "specifically reserved . . . should further review be required." *Id.*

After briefly addressing the *Tyler Pipe* retroactivity issue raised by the Department and then rejecting all the taxpayers' constitutional arguments, the court stated in conclusion it was "affirm[ing] the trial court judgments on

these key points" and "remand[ing] the cases to the trial court for further action consistent with this opinion." *Id.* at 604, 973 P.2d at 1022 (Pet. App. 25a).

REASONS WHY THE PETITION SHOULD BE DENIED

There is no basis for review in this case. The decision of the Washington Supreme Court is correct, and petitioners have not cited any decision of this Court or any other court in conflict with the decision below. In fact the questions presented by petitioners have long been settled. Moreover, petitioners are trying to relitigate issues they lost in *Tyler Pipe* and *American Nat'l Can*. The Court should not encourage this kind of behavior. The petition should be denied.

I. The Court Lacks Jurisdiction Because There Is No Final Judgment.

This Court has jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]" 28 U.S.C. § 1257(a). If the decision of the highest state court is not a final judgment, this Court lacks jurisdiction over the case. *Flynt v. Ohio*, 451 U.S. 619 (1981). Traditionally, the Court requires state court judgments to be final as to all of the legal and factual issues in the case, not just the important ones or the federal ones. R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 94 (7th ed. 1993). The controversy is not completely resolved because the Washington Supreme Court "remand[ed] the cases to the trial court for further action consistent with this opinion." 137 Wash. 2d at 604, 973 P.2d at 1022 (Pet. 25a). *See Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982).

Under the Washington Supreme Court's opinion, the trial court must resolve federal and state law questions of issue preclusion based on the judgments in *Tyler Pipe* and *American Nat'l Can*. *See* 137 Wash. 2d at 584, 592, 973 P.2d at 1013, 1016-17 (Pet. App. 2a, 10a-11a).

This case does not fall within *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which holds that a decision may

be a final judgment even though the case is remanded to a trial court for further proceedings. First, under *Cox* a decision is final if "the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The remaining issues in this case are not controlled or preordained by the Washington Supreme Court's decision sustaining the validity of the B&O tax and the two-way credit, as petitioners argued below.

Second, a decision is final if the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. In this case, at least two of the constitutional issues will not survive if Washington prevails on issue preclusion.

Third, a decision is final if "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. In this case, all of the federal issues would be preserved if petitioners prevail on the issue preclusion questions remanded to the trial court.

Finally, the Court occasionally considers a decision final where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action[.]" *Id.* at 482-83. The Court has applied this exception only when there were "identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts." *Flynt v. Ohio*, 451 U.S. at 622. In this case, there are no federal policies that would be undermined by continuation of the litigation. Indeed, as we have pointed out, this case involves long-settled law.

II. Retroactive Application of the 1987 Two-Way Credits Does Not Violate Due Process.

A. The Court Below Erred in Giving *Tyler Pipe* Retroactive Application.

Grace and Chrysler present four questions in their petition. The first three involve objections under the Due Process Clause to the retroactive application of the 1987 two-way credit law to periods before June 23, 1987, the date of *Tyler Pipe*, as the exclusive relief for retroactive application of the Commerce Clause discrimination holding in *Tyler Pipe*. Grace and Chrysler obviously are entitled to no relief under the Due Process Clause for pre-*Tyler Pipe* periods unless the B&O taxes assessed against them for such periods impermissibly discriminated against interstate commerce. Thus, retroactive application of *Tyler Pipe* is a necessary premise underlying each of the petitioners' Due Process questions.

The Washington Supreme Court erred in giving *Tyler Pipe* retroactive application in this case. This question is addressed in the Department's conditional cross-petition, Supreme Court No. 99-233.

B. Petitioners' Argument that Retroactive Application of the Two-Way Credits Fails to Provide Them "Meaningful Backward-Looking Relief" Is Meritless.

Petitioners first argue that retroactive application of the 1987 two-way credit statute violates the Due Process Clause as interpreted in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Pet. 8-16. The court below correctly concluded that this argument is meritless. 137 Wash. 2d at 594-98, 973 P.2d at 1018-19 (Pet. App. 14a-18a).

As the court below recognized, and as petitioners now are forced to concede, the *McKesson* line of cases holds that a

"State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination," and that the Due Process Clause demands only that, "to cure the illegality of the tax as originally imposed," the State must "ultimately collect a tax for the contested tax period" that no longer impermissibly discriminates. 137 Wash. 2d at 594-95, 973 P.2d at 1018 (Pet. App. 14a-15a) (quoting *McKesson*, 496 U.S. at 39-40, and *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994)). Retroactively extending the benefit of the two-way credits to petitioners does exactly that, by completely eliminating their "exposure to the burden of a multiple tax on manufacturing and wholesaling." *Tyler Pipe*, 483 U.S. at 246.[3]

Because petitioners must concede that the two-way credit system provides a "clear and certain remedy" if it "creates in hindsight a nondiscriminatory scheme," their Due Process Clause argument quickly changes to an argument that the current system "discriminates against interstate commerce today." Pet. 11. The court below was familiar with petitioners' Commerce Clause discrimination arguments, having answered the arguments previously when petitioners made them in *American Nat'l Can*. *See* 137 Wash. 2d at 586, 591, 596, 973 P.2d at 1014, 1016, 1019 (Pet. App. 4a, 9a, 15a).[4]

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[3] Petitioners' reliance on *General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999), is misplaced. The California court reasoned that the two-way credits this Court suggested in *Tyler Pipe* (which Washington quickly adopted) "would effectively make local and out-of-state manufacturers equally subject to selling taxes and exempt from manufacturing taxes." *Id.* at 456, 81 Cal. Rptr. 2d at 548-49. In contrast, the credits San Francisco proposed "would not fully eliminate the discrimination suffered by General Motors[.]" *Id.* Rather than supporting petitioners' argument, *General Motors* actually undercuts it.

[4] Grace and Chrysler were parties in *American Nat'l Can*. Under state issue preclusion rules, they should have been precluded from relitigating this Commerce Clause discrimination issue—the necessary foundation for the Due Process Clause question they are now attempting to

First, petitioners wrongly claim[5] that the two-way credit involves burdensome recordkeeping requirements, including special records to trace which specific products manufactured elsewhere are sold in Washington. Pet. 12. Washington only requires the normal records maintained by a business, such as sales contracts, shipping documents, and tax returns. Wash. Admin. Code § 458-20-19301(9). App. 15a-16a. There is no requirement for special records to trace specific products. Instead, the Department authorizes taking credits based on a "test period, formulary, or volume percentage basis[.]" Wash. Admin. Code § 458-20-19301(8)(b). (App. 15a).

The trial court awarded Chrysler injunctive relief in the amount of $125,000, based on prospective and retroactive application of the two-way credits. The court did so without requiring Chrysler to submit special records to trace which specific products it manufactured elsewhere were sold in Washington. Instead, Chrysler's relief was based only on general business records showing it paid a qualifying manufacturing tax to the State of Delaware during the contested periods. The parties stipulated to the amount based on a formula estimating sales in Washington from Delaware.

The reason the trial court denied any injunctive relief to Grace was not due to the absence of adequate records. Rather, the corporate records obtained by the Department through discovery showed conclusively that Grace, in contrast to Chrysler, had paid no qualifying gross receipts taxes to any other jurisdiction during any contested periods, including the

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bring before this Court. The Washington Supreme Court remanded the case to the trial court to reconsider this state law issue preclusion question.

[5] Petitioners are well aware that the Department does not require special records because they made the same claim in *American Nat'l Can*. In response, the Department submitted affidavits explaining what records are required and how a test period is used to establish a claim for credits. See App. 18a-26a. These affidavits were submitted in this case as part of the Department's argument that issue preclusion bars these petitioners, who were parties in *American Nat'l Can*, from relitigating the validity of the two-way credit under the Commerce Clause.

three tax years after enactment of the two-way credit statute in 1987.

Second, petitioners rely on their own failure to qualify for large amounts of credits and meaningless statistics to contend that the two-way credit system discriminates against interstate commerce "as a practical matter." Pet. 12-14. This argument was answered in *American Nat'l Can*, where similar statistics were offered to prove the "continuing discriminatory effect of Washington's law." 114 Wash. 2d at 240, 246-47, 787 P.2d at 547, 550. The statistics simply reflect the fact that few states other than Washington currently impose gross receipts taxes on businesses. That other sovereign states have made different tax choices does not render Washington's tax system discriminatory. The validity of one state's tax system does not depend on the tax laws of other states. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277 n.12 (1978); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946); *see also Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 338 (1994) (O'Connor, J., concurring in the judgment in part and dissenting in part) (recognizing the "well-established proposition that States need not conform their taxing practices to those of their neighbors").[6]

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[6] This Court applies the hypothetical internal consistency test precisely because "[a]ny other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States[.]" *Tyler Pipe*, 483 U.S. at 247 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984)). Washington's two-way credit system obviously is internally consistent. Furthermore, if every other state *actually* imposed some form of gross receipts taxes on manufacturing activities, at higher rates than Washington's B&O taxes on selling activities, an out-of-state manufacturer, such as Grace or Chrysler, would be "entitled to an automatic, 100% credit" for its manufacturing taxes "against its B&O selling taxes." Without changing any feature of its tax system, Washington would then provide "automatic credits" to interstate businesses. Pet. 11-12. This demonstrates that the "comparative economic disadvantage for interstate businesses" allegedly engendered by Washington's two-way credit system is the product of other states' tax policy choices, not anything inherent in the 1987 two-way credit law.

Third, petitioners argue that the two-way credit system discriminates because interstate taxpayers "must prove that the tax imposed by another jurisdiction" is "identical to Washington's B&O tax." Pet. 14. This is petitioners' way of saying that the credits apply only to gross receipts taxes, not to net income taxes, value added taxes, or franchise taxes. *See* Wash. Rev. Code § 82.04.440(5). When presented with this same argument in *American Nat'l Can*, the Washington Supreme Court explained in detail why this "cannot constitute facial discrimination." 114 Wash. 2d at 241-44, 787 P.2d at 547-49. *See Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175, at 192 n.6 (1995) (discussing the requirement that if states provide credits for payment of "in-state taxes," they must extend such credits to payment of "equivalent out-of-state taxes").

In short, neither the Due Process Clause question nor the disguised Commerce Clause discrimination question presented by petitioners is a substantial federal question.

C. Petitioners' "Bait and Switch" Procedural Due Process Argument Also Is Meritless.

Petitioners also argue the Washington Supreme Court's retroactive application of the 1987 two-way credit statute, as the appropriate relief for the Washington court's retroactive application of *Tyler Pipe*'s discrimination ruling, conflicts with this Court's decisions in *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Dep't of Rev.*, 522 U.S. 442 (1998). Pet. 16-19. As the court below correctly concluded, petitioners' reliance on *Reich* and *Newsweek* as support for their "bait and switch" attack on the 1987 credit statute is misplaced. 137 Wash. 2d at 593-96, 598-99, 973 P.2d at 1017-18, 1019-20 (Pet. App. 13a-15a, 18a-20a).

In *Reich*, the Georgia Supreme Court interpreted a broadly worded statute authorizing a taxpayer to claim a refund of "any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him" as inapplicable when a tax statute is declared unconstitutional.

513 U.S. at 109. Therefore, the Georgia court dismissed the refund action *without addressing the merits* of Reich's federal claims. *Id.* at 110. This Court reversed, holding that the Due Process Clause did not permit Georgia to hold out a "clear and certain" postpayment procedural remedy in the form of a refund action and then, after taxpayers had paid disputed taxes, to declare no such procedural remedy ever existed. *Id.* at 111.

In *Newsweek*, the Florida District Court of Appeal, failing to consider this Court's holding in *Reich*, interpreted Florida law as permitting prepayment tax challenges and therefore dismissed Newsweek's postpayment refund action to contest sales taxes the Florida Supreme Court earlier had held to violate the First Amendment. This Court summarily reversed, explaining that under Florida law there was a longstanding practice of permitting taxpayers to bring refund actions for taxes paid under an unconstitutional statute and that the State did not dispute "this settled understanding" of Florida law. Based on *Reich*, this Court held that Newsweek was entitled to a clear and certain remedy and thus it could "use the refund procedures to adjudicate the merits of its claim."

The problem in *Reich* and *Newsweek* was that the state went from a post-deprivation refund remedy to an exclusive pre-deprivation remedy. Thus, it was impossible to challenge taxes that had already been paid. Washington's two-way credit law did not "switch" the post-deprivation refund remedy to a pre-deprivation remedy. The two-way credit law authorized either refunds or injunctive relief necessary to cure the constitutional defect in the multiple activities exemption. This Court has recognized that states have the authority to tailor a refund remedy to cure constitutional defects in their tax systems. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-41, 44 n.27 (1990); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100-02 (1993); *Associated Indus. v. Lohman*, 511 U.S. 641, 656 (1994); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755-56 (1995).

Washington law offered these petitioners a choice of either a prepayment procedural remedy (an injunction action under Wash. Rev. Code § 82.32.150) or a postpayment procedural remedy (a refund action under Wash. Rev. Code § 82.32.180). Petitioners chose to file injunction actions. In sharp contrast to what occurred in *Reich* and *Newsweek*, the courts below adjudicated the merits of their claims. That is all the "process" petitioners were "due" in this situation. There was no "bait and switch." Petitioners received precisely the prepayment procedural remedy promised by Washington law.

Petitioners' apparent assertion that until August 1987 Washington law promised them complete injunctive relief on demand–regardless of the merits of their constitutional claims–obviously is incorrect. The statute petitioners allegedly relied upon (Pet. 18-19), Wash. Rev. Code § 82.32.150, provides no direction to the courts as to what form or degree of anticipatory relief, if any, is appropriate when a tax statute or its application is declared unconstitutionally discriminatory. Such a question of appropriate relief always has been determined on a case-by-case basis by considering all pertinent provisions of federal and state law, including any applicable state statutes enacted before the action is concluded. *See, e.g.*, *American Nat'l Can*, 114 Wash. 2d 236, 249-53 & n.4, 787 P.2d 545, 551-53 & n.4, *cert. denied*, 498 U.S. 880 (1990); *Bond v. Burrows*, 103 Wash. 2d 153, 161-63, 690 P.2d 1168, 1172-73 (1984); *Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 484-88, 60 P.2d 86, 91-93 (1936); *Jensen v. Henneford*, 185 Wash. 209, 220, 53 P.2d 607 (1936); *Nipges v. Thornton*, 119 Wash. 464, 467-68, 206 P. 17, 18-19 (1922); *Simpson v. State*, 26 Wash. App. 687, 695-96, 615 P.2d 1297, 1301-02, *review denied*, 94 Wash. 2d 1022 (1980); Wash. Rev. Code § 82.98.030.

Wash. Rev. Code § 82.32.150 is nothing more than a procedural statute, conditionally waiving the State's sovereign immunity pursuant to Wash. Const. art. II, § 26, which provides that the Washington Legislature "shall direct by law,

in what manner, and in what courts, suits may be brought against the state." The statute merely authorizes a court, in an appropriate case, to issue an injunction on state or federal grounds, notwithstanding the existence of an adequate legal remedy in the form of a refund action. *See Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wash. 2d 785, 791, 638 P.2d 1213, 1216 (1982).[7]

Nor could petitioners reasonably believe they would receive complete injunctive relief based on the vague dictum[8] in *National Can II*: "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds." 109 Wash.2d at 880-81, 749 P.2d at 1286. In that dictum, the Washington court did not say that state law would mandate *full* refunds if *Tyler Pipe* were applied retroactively; it said "refunds" would be required. Two years after *National Can II*, when the court actually confronted the question of appropriate relief under Washington law for the Commerce Clause discrimination holding in *Tyler Pipe*, the court squarely held that "[f]ull refunds are not appropriate" and that the taxpayers instead were entitled to more limited refunds based on the retroactive application of the two-way credit law. *American Nat'l Can*, 114 Wash. 2d at 253, 787 P.2d at 583.

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[7] Petitioners also cite Wash. Rev. Code § 82.04.4286 in support of their "bait and switch" argument. Pet. 18. That statute, which merely expresses a legislative intent not to impose any tax that the constitution would prohibit it from imposing, has no application in this case. By retroactively curing the constitutional defects of the "multiple activities exemption," the Legislature was no longer "prohibited from taxing" petitioners "under . . . the constitution or laws of the United States." Thus, in light of the *McKesson* line of cases, petitioners' argument based on this statute must fail as circular.

[8] As explained at page 4-5, *supra*, the Washington Supreme Court held in *National Can II* that the discrimination ruling announced in *Tyler Pipe* applied purely prospectively. Because the Washington Supreme Court held the former multiple activities exemption was constitutional during all the tax periods at issue in *National Can II*, *see* 109 Wash. 2d at 881, any discussion of what would otherwise be appropriate retroactive relief in that case obviously was unnecessary to the court's decision.

Thus, in referring to "refunds" in *National Can II*, the court probably meant refunds based on retroactive application of the 1985 and 1987 credit statutes.[9]

Even if petitioners' characterization of Washington law before August 1987 were accurate, however, it is immaterial. Neither *Reich* nor *Newsweek* overruled the *McKesson* line of cases, which permitted the State of Washington to retroactively "reformulate and enforce" its B&O taxes "during the contested tax period[s] in any way that treats petitioner[s] and [their] competitors in a manner consistent with the dictates of the Commerce Clause." *McKesson*, 496 U.S. at 40. That is precisely what the Washington Legislature did in 1987 and what the Supreme Court of Washington did below. *Reich* and *Newsweek* are consistent with the *McKesson* line of cases because the changes from a post-deprivation remedy to a pre-deprivation remedy in *Reich* and *Newsweek* were unrelated to curing the underlying discrimination problems with the taxes at issue.

In short, this Due Process Clause question presented by petitioners is not a substantial federal question.

D. Petitioners' Substantive Due Process Argument Also Is Meritless.

Petitioners also argue the Washington Supreme Court's retroactive application of the 1987 two-way credit statute, as the appropriate relief for the Washington court's retroactive application of *Tyler Pipe*'s discrimination ruling, violates substantive due process limitations on retroactive legislation. Pet. 20-23. Without citing any relevant supporting authority, petitioners contend that section 3 of the 1987 statute (App. 4a) is unsupported by any legitimate legislative purpose and is "applied so far back in time" as to violate the Due Process

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[9] Unlike the taxpayers in *Reich* and *Newsweek*, it is hard to fathom how the court's dictum in *National Can II* could have induced these petitioners to take any actions they otherwise would not have taken. Even now, they still have not paid the taxes assessed against them.

Clause. The court below, applying this Court's precedents, correctly concluded that these arguments have no substance. 137 Wash. 2d at 599-603, 973 P.2d at 1020-21 (Pet. App. 20a-24a).

United States v. Carlton, 512 U.S. 26 (1994), clarifies that a retroactive tax provision violates substantive due process limitations only if the provision fails the usual minimal rationality due process test applied to economic legislation generally. *Id.* at 35; *see id.* at 40 (Scalia, J., concurring in the judgment). That is, the retroactive application of a new tax provision must be so arbitrary and irrational as to be wholly unrelated to any legitimate purpose.

In *American Nat'l Can*, the Washington Supreme Court previously answered the similar argument of Grace and Chrysler questioning the Legislature's motivation behind the 1987 statute, stating:

> [T]he State's desire to maintain its revenues is proper. Indeed, the Supreme Court has repeatedly stated that the commerce clause does not relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. State tax revenues fund every beneficial action the state takes.

114 Wash. 2d at 247, 787 P.2d at 550.

As for petitioners' argument that the period of retroactivity is excessive, it is important to remember that the 1987 statute was curative legislation that offered *relief* to interstate manufacturers. The statute did not increase even one taxpayer's tax burden. Even before *Carlton*, this Court had held that before a retroactive tax provision could be challenged under the Due Process Clause, the tax provision must, as a threshold matter, at least leave the taxpayer "worse off" than the taxpayer would have been under the prior tax law. *See United States v. Hemme*, 476 U.S. 558, 568-71 (1986). The 1987 statute did not defeat any reasonable expectations of these

petitioners. Grace's tax obligations remained the same as before the legislation; Chrysler's were reduced by $125,000.[10]

In short, this Due Process Clause question presented by petitioners is not a substantial federal question.

III. The Apportionment Question Petitioners Pose Is So Explicitly Foreclosed by Prior Decisions of This Court As To Leave No Room for Real Controversy.

Petitioners argue their petition should be granted "to confirm that apportionment of gross receipts taxes is a constitutional mandate to taxing states." Pet. 29. Petitioners state the question as "Is the Commerce Clause violated by the State of Washington's imposition of an unconstitutional gross receipts tax scheme and discriminatory tax credit without apportioning the tax as this Court requires under *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995)?" Pet. i.

Petitioners' question misstates Washington law. Washington does not impose its B&O tax system "without apportioning the tax[es]." Washington taxes only extracting, manufacturing, and selling activities that take place in this state. If a Washington business manufactures a product in

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[10] Petitioners' reliance in regard to this question on *General Motors Corp. v. City & County of San Francisco*, 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544 (1999), is somewhat ironic. When the California court discussed the Washington Supreme Court's approval in *Digital* of retroactively applying the two-way credits, it distinguished *Digital* as involving "recent tax years" (August 1987 credits applied retroactively to January 1983) and a taxpayer that candidly conceded "it had not been double taxed." *Id.* Thus, the California court did not perceive its holding to be in conflict with that of the Washington Supreme Court in *Digital*. Here, in Chrysler's case, the two-way credits were applied retroactively only back to January 1984. And in Grace's case, although Grace refused to concede the point, the Department proved conclusively that it, like Digital, had not been "double taxed." Based on the evidence submitted, applying a summary judgment standard, the trial court found that Grace was "not entitled to any multiple activities tax credit for the period January 1, 1980, through December 31, 1990." Cross-Pet. App. 3a (No. 99-233).

California and sells it in Oregon, not one cent of the gross receipts from those activities will be subject to B&O tax. None of Washington's B&O taxes are unapportioned. Its extracting, manufacturing, and selling B&O taxes all are inherently apportioned because the taxes apply only when those taxed activities (extracting, manufacturing, or sales) occur in Washington.

The petition of Grace and Chrysler is vague as to which of these B&O taxes they are challenging as unfairly apportioned. In the assessments that it attacked below, Chrysler was assessed only for unpaid selling B&O taxes. Consequently, these were the only B&O taxes it challenged (or had standing to challenge) on apportionment grounds. In the assessments it attacked, Grace was assessed primarily for unpaid selling B&O taxes, but also for a relatively small amount of unpaid manufacturing B&O taxes for one of its division's manufacturing operations in Washington. In the courts below, Grace, like Chrysler, directed its apportionment arguments only to the selling B&O taxes, the same taxes both of them previously challenged unsuccessfully in *Tyler Pipe*.[11] Therefore, we will assume petitioners' apportionment question is limited to Washington's selling B&O taxes.[12]

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[11] This also was the only apportionment issue addressed in the Washington Supreme Court's opinion below. The court below stated that petitioners "ask us to ignore our own and the United States Supreme Court's rulings and revisit the apportionment issue." 137 Wash. 2d at 596, 973 P.2d at 1019 (Pet. App. 16a-17a). The court cited none of this Court's or its own decisions involving apportionment challenges to manufacturing taxes, *e.g.*, *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919); *Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965), which suggests that the court was not addressing such a question.

[12] The only hint in their petition that petitioners might also be attempting to challenge Washington's manufacturing B&O tax on apportionment grounds is their citation to a trade journal article discussing "an unapportioned manufacturing tax measured by gross receipts." Pet. 26-27. In reviewing state court decisions under 28 U.S.C. § 1257, however, this Court will not consider a federal question unless it was either addressed

As petitioners acknowledge, Pet. 24, this Court unanimously upheld Washington's selling B&O taxes as fairly apportioned in *Tyler Pipe* be[illegible]se

> the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See *Moorman Mfg. Co. v. Bair*, 437 U.S., at 280-81 (gross receipts tax on sales to customers within State would be "plainly valid"); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S., at 564 (selling tax measured by gross proceeds of sales is "apportioned exactly to the activities taxed").

483 U.S. at 251.[13]

In rejecting the apportionment challenge renewed by Grace and Chrysler here,[14] this Court in *Tyler Pipe* applied settled Commerce Clause case law. For well over a century, this Court has upheld nondiscriminatory gross receipts taxes on interstate sales of goods imposed by the state of destination. *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S.

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by or properly presented to the state courts. *Street v. New York*, 394 U.S. 576, 581-85 (1969).

[13] In rejecting the apportionment argument of Grace and Chrysler in *Tyler Pipe*, this Court correctly observed that it rested "on the erroneous assumption that through the B&O tax, Washington is taxing the unitary activity of manufacturing and wholesaling." 483 U.S. at 251.

[14] Grace and Chrysler were parties in *National Can I*, No. 85-2006, and litigated in *Tyler Pipe* whether Washington's B&O selling taxes are fairly apportioned. Therefore, federal common law rules of issue preclusion should have prevented them from relitigating this same issue in the courts below. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). If this Court were to review the fourth question presented by petitioners, it would first need to address this threshold federal issue preclusion question. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 409 (1994); *Haring v. Prosise*, 462 U.S. 306, 313-17 (1983).

436 (1964); *Field Enters., Inc. v. Washington*, 352 U.S. 806 (1956), *aff'g per curiam* 47 Wash. 2d 852, 289 P.2d 1010 (1955); *Norton Co. v. Department of Rev.*, 340 U.S. 534 (1951); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944); *Department of Treasury v. Allied Mills, Inc.*, 318 U.S. 740 (1943), *aff'g per curiam* 220 Ind. 340, 42 N.E.2d 34 (1942); *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); *Woodruff v. Parham*, 8 Wall. 123 (1868); *see also Westinghouse Elec. Corp. v. King*, 678 S.W.2d 19 (Tenn. 1984), *appeal dismissed for want of a substantial federal question*, 470 U.S. 1075 (1985); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wash. 2d 814, 659 P.2d 463, *appeal dismissed for want of a substantial federal question*, 464 U.S. 1013 (1983); *Stone v. Stapling Machs. Co.*, 220 Miss. 470, 71 So. 2d 205, *appeal dismissed for want of a substantial federal question*, 348 U.S. 802 (1954).

For nearly a century, this Court also has consistently rejected Commerce Clause challenges to state or local gross receipts taxes on manufacturing, extracting, and producing activities measured, like Washington's B&O taxes, by the value of the products. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 & n.7 (1981) (extracting); *Aponaug Mfg. Co. v. Stone*, 314 U.S. 577 (1941), *aff'g per curiam* 190 Miss. 805, 1 So. 2d 763 (1941) (manufacturing); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932) (generating electricity); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (extracting); *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924) (extracting); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (extracting); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (extracting); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufacturing); *see also Reynolds Metals Co. v. Washington*, 65 Wash. 2d 882, 400 P.2d 310, *appeal dismissed for want of a substantial federal question*, 382 U.S. 160 (1965) (manufacturing).

Petitioners seem to contend that this Court overruled both these lines of cases *sub silentio* in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). See Pet. 24-26. In *Jefferson Lines*, this Court upheld Oklahoma's sales tax on the full price of a ticket for interstate transportation services as consistent with the Commerce Clause. 514 U.S. at 177, 200. *Jefferson Lines* might have rendered "suspect" the continuing authority of *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), *see Jefferson Lines*, 514 U.S. at 179, 189-92 & nn.5-6, 195-96 & n.7; *id.* at 200-01 (Scalia, J., concurring in the judgment); *id.* at 201-06 (Breyer, J., dissenting), but it did not undermine in the slightest the above lines of cases concerning taxes imposed on production or sales of goods. Indeed, in *Jefferson Lines*, this Court cited *Commonwealth Edison*, *International Harvester*, and *Tyler Pipe*, without questioning their holdings or their reasoning. *See id.* at 183, 188-89, 192 n.6, 199-200. The Washington Supreme Court below simply followed settled apportionment rules applied in this Court's controlling precedents, as was its duty.

Petitioners state that "subsequent to *Jefferson Lines*, the Supreme Courts of Alabama and Virginia have struck down unapportioned gross receipts taxes on interstate manufacturers" on Commerce Clause grounds, citing *M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592 (Ala. 1998), and *City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996). Pet. 26. The decision below is not in conflict with either of those decisions. There is no suggestion whatsoever in either *M & Assocs.* or *American Woodmark* that *Jefferson Lines* undermined this Court's apportionment holding in *Tyler Pipe*.[15]

The gross receipts taxes the Virginia and Alabama courts struck down in *American Woodmark* and *M & Assocs.*

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[15] Petitioners do not explicitly argue that the court below has decided an "important federal question" in a way that "conflicts" with *Jefferson Lines*, *M & Assocs.*, or *American Woodmark*, within the meaning of Rule 10. It obviously has not.

differed dramatically from the Washington selling B&O taxes, which apply only to sales that take place in Washington. In *American Woodmark*, the city attempted to apply its gross receipts tax to 100% of the company's nationwide gross revenues, merely because the company's headquarters building was in the city. 471 S.E.2d at 496, 498. The company operated 24 facilities in 13 different states, including manufacturing plants, distribution centers, and service and sales offices. None of those facilities were located in the city and almost none of the company's customers were either. *Id.*

Similarly, in *M & Assocs.*, the city attempted to apply its gross receipts tax to all the company's receipts from sales, including sales in other states, again merely because the company's headquarters building was in the city. 723 So. 2d at 592-93. The Alabama court correctly held that the city's tax failed the "internal consistency" test. *Id.* at 598-99. Thus, the local gross receipts taxes in *American Woodmark* and *M & Associates* truly were unapportioned.

In contrast, the selling B&O taxes this Court upheld in *Tyler Pipe* (when Grace and Chrysler previously litigated this question) are inherently apportioned because they are imposed only on sales in Washington. No other state could constitutionally impose a similar gross receipts tax on the same sales. *See, e.g., Evco v. Jones*, 409 U.S. 91 (1972); *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

Despite petitioners' strained arguments to the contrary, Pet. 28-29, Washington's selling B&O taxes, as well as the B&O tax system as a whole with the two-way credits, obviously are internally consistent and externally consistent.

In short, the Commerce Clause apportionment question presented by petitioners is not a substantial federal question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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State of Washington
DONALD F. COFER*
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August 30, 1999

APPENDIX

1987 WASH. LAWS, 2ND EX. SESS. CH. 3

BUSINESS AND OCCUPATION TAX– MULTIPLE ACTIVITIES–TAX CREDITS

AN ACT Relating to business and occupation taxation of multiple activities; amending RCW 82.04.440; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the invalidation of the multiple activities exemption contained in RCW 82.04.440 by the United States Supreme Court now requires adjustments to the state's business and occupation tax to achieve constitutional equality between Washington taxpayers who have conducted and will continue to conduct business in interstate and intrastate commerce. It is the intent of this act to preserve the integrity of Washington's business and occupation tax system and impose only that financial burden upon the state necessary to establish parity in taxation between such taxpayers.

Thus, this act extends the system of credits originated in RCW 82.04.440 in 1985 to provide for equal treatment of taxpayers engaging in extracting, manufacturing or selling regardless of the location in which any of such activities occurs. It is further intended that RCW 82.04.440, as amended by section 2 of this act, shall be construed and applied in a manner that will eliminate unconstitutional discrimination between taxpayers and ensure the preservation and collection of revenues from the conduct of multiple activities in which taxpayers in this state may engage.

Sec. 2. Section 82.04.440, chapter 15, Laws of 1961 as last amended by section 1, chapter 190, Laws of 1985 and RCW 82.04.440 are each amended to read as follows:

(1) ((~~Except as provided in subsections (2) and (3) of this section,~~)) Every person engaged in activities which are

within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall ((~~not be taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold~~)) be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under section (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) shall ((~~not be taxable under RCW 82.04.230~~)) be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4)(((~~a) If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that subsection (2) of this section results in an unconstitutional discrimination against interstate or foreign commerce, and that relief is appropriate for any tax reporting periods either before or after April 30, 1985, it is the intent of the legislature that the credit provided in (b) of this subsection shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credit. It is further the intent of the legislature that such credit shall be applicable only under the conditions and to the extent provided in this subsection (4):~~

((~~(b) As provided in (a) of this subsection,~~)) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(((~~(c)~~))) (5) For the purpose of this ((~~subsection,~~)) section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax, and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(((~~(d) For the purpose of this subsection,~~)) (b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision ((~~thereof, or~~)) of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

NEW SECTION. Sec. 3. If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.

Pass the House August 10, 1987.

Approved by the Governor August 11, 1987.

Filed in Office of Secretary of State August 11, 1987.

WAC 458-20-19301 Multiple activities tax credits. (1) Introduction. Under the provisions of RCW 82.04.440 as amended effective August 12, 1987, Washington state's business and occupation taxes imposed under chapter 82.04 RCW were adjusted to achieve constitutional equality in the tax treatment of persons engaged in intrastate commerce (within this state only) and interstate commerce (between Washington and other states). The business and occupation tax system taxes the privilege of engaging in specified business activities based upon "gross proceeds of sales" (RCW 82.04.070) and the "value of products" (RCW 82.04.450) produced in this state. In order to maintain the integrity of this taxing system, to eliminate the possibility of discrimination between taxpayers, and to provide equal and uniform treatment of persons engaged in extracting, manufacturing, and/or selling activities regardless of where performed, a statutory system of internal and external tax credits was adopted, effective August 12, 1987. This tax credits system replaces the multiple activities exemption which, formerly, assured that the gross receipts tax would be paid only once by persons engaged in more than one taxable activity in this state in connection with the same end products. Unlike the multiple activities exemption which only prevented multiple taxation from within this state, the credits of the new system apply for gross receipts taxes paid to other taxing jurisdictions outside this state as well.

(2) Definitions. For purposes of this section the following terms will apply.

(a) "Credits" means the multiple activities tax credit(s) authorized under this statutory system also referred to as MATC.

(b) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed

would not constitute the tax an income tax or value added tax; and

(ii) Which is not, pursuant to law or custom, separately stated from the selling price.

(c) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed by RCW 82.04.230 (tax on extractors) and similar gross receipts taxes paid to other states.

(d) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a manufacturer, and includes:

(i) The taxes imposed in RCW 82.04.240 (tax on manufacturers) and subsections (2) through (5) and (7) of RCW 82.04.260 (tax on special manufacturing activities) and

(ii) Similar gross receipts taxes paid to other states.

The term "manufacturing tax," by nature, includes a gross receipts tax upon the combination of printing and publishing activities when performed by the same person.

(e) "Selling tax" means a gross receipts tax imposed on the act or privilege of engaging in business as a wholesaler or retailer of tangible personal property in this state or any other state. The term "selling" has its common and ordinary meaning and includes the acts of making either wholesale sales or retail sales or both.

(f) "State" means:

(i) The state of Washington,

(ii) A state of the United States other than Washington or any political subdivision of such other state,

(iii) The District of Columbia,

(iv) Territories and possessions of the United States, and

(v) Any foreign country or political subdivision thereof.

(g) "Taxes paid" means taxes legally imposed and actually paid in terms of money, credits, or other emoluments to a taxing authority of any "state." The term does not include taxes for which liability for payment has accrued but for which payment has not actually been made. This term also includes business and occupation taxes being paid to Washington state together with the same combined excise tax return upon which MATC are taken.

(h) "Business," "manufacturer," "extractor," and other terms expressly defined in RCW 82.04.020 through 82.04.212 have the meanings given in those statutory sections regardless of how the terms may be used for other states' taxing purposes.

(3) Scope of credits. This integrated tax credits system is intended to assure that gross receipts from sales or the value of products determined by such gross receipts are taxed only one time, whether the activities occur entirely within this state or both within and outside this state. External tax credits arise when activities are taxed in this state and similar activities with respect to the same products produced and sold are also subject to similar taxes outside this state. There are five ways in which external tax credits may arise because of taxes paid in other states.

(a) Products or ingredients are extracted (taken from the ground) in this state and are manufactured or sold and delivered in another state which imposes a gross receipts tax on the latter activity(s). The credit created by payment of the other state's tax may be used to offset the Washington extracting tax liability.

(b) Products are manufactured, in whole or in part, in this state and sold and delivered in another state which imposes a gross receipts tax on the selling activity. Again, payment of the other state's tax may be taken as a credit against the Washington manufacturing tax liability.

(c) Conversely, products or ingredients are extracted outside this state upon which a gross receipts tax is paid in the state of extracting, and which are sold and delivered to buyers here. The other state tax payment may be taken as a credit against Washington's selling taxes.

(d) Similarly, products are manufactured, in whole or in part outside this state and sold and delivered to buyers here. Any other state's gross receipts tax on manufacturing may be taken as a credit against Washington's selling tax.

(e) Products are partly manufactured in this state and partly in another state and are sold and delivered here or in another state. The combination of all other states' gross receipts taxes paid may be taken as credits against Washington's manufacturing and/or selling taxes.

Thus, the external tax credits may arise in the flow of commerce, either upstream or downstream from the taxable activity in this state, or both. Products extracted in another state, manufactured in Washington state, and sold and delivered in a third state may derive credits for taxes paid on both of the out of state activities.

Internal tax credits arise from multiple business activities performed entirely within this state, all of which are now subject to tax, but with the integrated credits offsetting the liabilities so that tax is only paid once on gross receipts. Under this system Washington extractors and manufacturers who sell their products in this state at wholesale and/or retail must report the value of products or gross receipts under each applicable tax classification. Credits may then be taken in the amount of the extracting and/or manufacturing tax paid to offset the selling taxes due. There are three ways in which credits may arise because of taxes paid exclusively in this state.

(f) Products are extracted in Washington and directly sold in Washington. Extracting business and occupation tax and selling business and occupation tax must both be reported but the payment of the former is a credit against the latter.

(g) Similarly, ingredients are extracted in Washington and manufactured into new products in this state. The extracting business and occupation tax reported and paid may be taken as a credit against manufacturing tax reported.

(h) Products manufactured in Washington are sold in Washington. Again, the payment of the manufacturing tax reported may be credited against the selling tax (wholesaling and/or retailing business and occupation tax) reported.

All of the external and internal tax credits derived from any flow of commerce may be used, repeatedly if necessary, to offset other tax liabilities related to the production and sale of the same products.

(4) Eligibility for taking credits. Statutory law places the following eligibility requirements and limitations upon the MATC system.

(a) The amount of the credit(s), however derived, may not exceed the Washington tax liability against which the credit(s) may be used. Any excess of credit(s) over liability may not be carried over or used for any purpose.

(b) The person claiming the credit(s) must be the same person who is legally obligated to pay both the taxes which give rise to the credit(s) and the taxes against which the credit is claimed. The MATC is not assignable.

(c) The taxes which give rise to the credit(s) must be actually paid before credit may be claimed against any other tax liability. Tax liability merely accrued is not creditable.

(d) The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific.

(e) The effective date for developing and claiming credit(s) for products manufactured in Washington state and sold and delivered in other states which impose gross receipts selling taxes is June 1, 1987.

(f) The effective date for developing and claiming all credits other than those explained in subsection (e) above, is August 12, 1987.

(g) Persons who are engaged only in making wholesale or retail sales of tangible personal property which they have not extracted or manufactured are not entitled to claim MATC. Also, persons engaged in rendering services in this state are not so entitled, even if such services have been defined as "retail sales" under RCW 82.04.050. (See WAC 458-20-194 for rules governing apportionment of gross receipts from interstate services.)

(5) Other states' qualifying taxes. The law defines "gross receipts tax" paid to other states to exclude income taxes, value added taxes, retail sales taxes, use taxes, or other taxes which are generally stated separately from the selling price of products sold. Only those taxes imposed by other states which include gross receipts of a business activity within their measure or base are qualified for these credit(s). The burden rests with the person claiming any MATC for other states' taxes paid to show that the other states' tax was a tax on gross receipts as defined herein. Gross receipts taxes generally include:

(a) Business and occupation privileges taxes upon extracting, manufacturing, and selling activities which are similar to those imposed in Washington state in that the tax measure or base is not reduced by any allocation, apportionment, or other formulary method resulting in a downward adjustment of the tax base. If costs of doing business may be generally or routinely deducted from the tax base, the tax is not one which is similar to Washington state's gross receipts tax.

(b) Severance taxes measured by the selling price of the ingredients or products severed (oil, logs, minerals, natural products, etc.) rather than measured by costs of production, stumpage values, the volume or number of units produced, or some other formulary tax base.

(c) Business franchise or licensing taxes measured by the gross volume of business in terms of gross receipts or other financial terms rather than units of production or the volume of units sold.

Other states' tax payments claimed for MATC must be identifiable with the same ingredients or products which incurred tax liability in Washington state, i.e., they must be product specific.

(d) The department will periodically publish an excise tax bulletin listing current taxes in other jurisdictions which are either qualified or disqualified for credit under the MATC system.

(6) Deductions in combination with MATC. Effective August 12, 1987, with the enactment of the MATC system, the liability for actual payment of tax by persons who extract, manufacture, and sell products in this state was shifted from the selling activity (wholesaling or retailing) to the production activity (extracting and/or manufacturing). As explained, the payment of the production taxes may now be credited against the liability for selling taxes on the same products. However, the deductions from tax provided by chapter 82.04 RCW (business and occupation tax deductions) may still be taken before tax credits are computed and used, with noted exceptions. In order for the MATC system to result in the correct computation of tax liabilities and credit applications, the tax deductions which may apply for any reporting period must be taken equally against both levels of tax liability reported, i.e., at both the production and selling levels. Failure to report tax deductions in this manner will result in overreporting tax due and may result in overpayment of tax. Thus, with the exceptions noted below, tax deductions formerly reported only against selling activities should now be reported against production activities as well. All such deductions, the result of which is to reduce the measure of tax reported, should be taken against both the production taxes (extracting or

manufacturing) and the selling taxes (wholesaling and/or retailing equally.

(a) Example:

(i) A company manufactures products in Washington which it also sells at wholesale for $5,000 and delivers to a buyer in this state. The buyer defaults on part of the payment and the seller incurs a $2,000 credit loss which it writes off as a bad debt during the tax reporting period. The bad debt deduction provided by RCW 82.04.4284 must be shown on both the manufacturing-other line and the wholesaling-other line of the combined excise tax return. Taking the deduction on only one of those activities results in overreported tax liability on the $2,000 loss.

(b) Exceptions. The deductions generally provided by RCW 82.04.4286, for interstate or foreign sales (where goods are sold and delivered outside this state) may not be taken against tax reported at the production level (extracting or manufacturing). This is because the MATC system itself provides for tax credits instead of tax deductions on gross receipts from transactions involving goods produced in this state and sold in interstate or foreign commerce. Thus, deductions which eliminate transactions from tax reporting may be taken only against selling taxes.

(c) Applicable deductions should be shown on the front of the combined excise tax return (Column #3) on each applicable tax classification line and detailed on the back side of the return, as usual, before MATC is taken.

(d) It is not the intent of the MATC law to invalidate or nullify the business and occupation tax exemption for taxable amounts below minimum (see WAC 458-20-104). Thus any person whose gross receipts or value of products reported under any single tax classification with respect to the production and sale of any product is less than the minimum taxable amount will not incur tax liability merely because of the requirement to report those gross receipts or value of

products on the same product under other tax classifications as well.

(i) Example: A person both manufactures and sells at wholesale $2,000 worth of widgets in the first quarter of a tax year. The requirement to report the $2,000 tax measure under both the manufacturing-other classification and the wholesaling-other classification gives the false appearance of $4,000 in gross receipts during this quarter. However, only the amount reported under the manufacturing-other classification need be considered to determine eligibility for the amount-below-minimum exemption.

(7) How and when to take MATC. The credits available under the MATC system are all to be taken on the combined excise tax return beginning in August, 1987 and thereafter. The return form has been modified to accommodate these credits. Each tax return upon which MATC has been taken must be accompanied by a completed Schedule C. This schedule details the business activities and credits computations. The line by line instructions insure that no more or no less credits are claimed than are authorized under the law.

(8) Consolidation of tax liabilities and credits. Under the MATC system a person's Washington tax liability for all activities involved in that person's production and sale of the same ingredients or products (extracting, and/or manufacturing, and/or selling) is to be reported only at the time of the sale of such products or at the time of that person's own use of such products for commercial or industrial consumption. All of the taxable activities are to be reported on that same periodic excise tax return. Also, all external and internal tax credits derived from the payment of any gross receipts taxes on any of these activities are to be taken at that time. Thus, the taxable activities and the tax credits are procedurally consolidated for reporting. This consolidation generally overcomes any need to track ingredients or products from their extraction to their sale. It also overcomes any need to report and pay Washington tax liability during one reporting period and to take credits against

that tax liability in a different reporting period. Thus, except as noted below, there can be no credit carryovers or carrybacks under this system.

(a) Exception. Where different tax periods are assigned by Washington state and another state to a company doing business both within and outside Washington state, the other state's gross receipts tax on the same products may not yet have been paid when the Washington tax is due for reporting and payment. In such cases the Washington tax due must be timely reported and paid during the period in which the sale is made. The external credit arising later, when the other state's tax is paid, may be taken as a credit against any Washington business and occupation tax reported during that later period. Thus, the limitation that the MATC must be product-specific by being limited to the amount of Washington tax paid on the same products does not mean that the credit(s) can only be used against precisely those same Washington taxes paid.

(i) In the situation described in subsection (a) above, if there is not sufficient Washington business and occupation tax due for payment in the later period, when the external tax credit arises, to allow for utilization of the entire credit, the amount of any overage may be carried forward and taken against Washington taxes reported in subsequent reporting periods until fully used.

When filing such exception returns, the full amount of any credits should be claimed, even though that credit amount will exceed the amount of tax liability reported for that period. The department of revenue itself will make the necessary adjustments and will perform the carrying over of any excess credits into future reporting periods.

(ii) In the same situation, if the person entitled to claim such credit overage is no longer engaged in taxable business in this state or for any other reason does not incur sufficient Washington business and occupation tax liability to fully utilize the perfected credit overage, a tax refund will be issued.

(iii) No tax refunds, MATC carryovers, or MATC carrybacks will be allowed under any circumstances other than those explained above.

(b) Special circumstances may arise where it is not possible to specifically identify ingredients or products as they move from production to sale (e.g., fungible commodities from various sources stored in a common warehouse). In such cases the taxpayer should seek advance approval from the department, in writing, for tax reporting and credit taking on a test period, formulary, or volume percentage basis, subject to audit verification.

(9) Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

(e) Copies of cancelled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section.

(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)

(10) MATC in combination with other credits. The tax credits authorized under this system may be taken in combination with other tax credits available under Washington law. Such other credit programs, however, authorize credit carryovers from reporting period to period until the credits are fully utilized. Thus, the MATC must be computed and used to offset business and occupation tax liabilities during any tax reporting period before any other program credits to which a claimant may be entitled are claimed or applied. Failure to compute and take the MATC before applying other available credits may result in the loss of the other credit benefits.

(11) Superseding provisions. The MATC provisions of this section supersede and control the provisions of other sections of chapter 458-20 WAC (other tax rules) relating to intrastate, interstate, and foreign transactions to the extent that such provisions are or appear to be contrary or conflicting.

(12) Unique or special credit situations–Appeals. The provisions of this section generally explain the nature of the MATC system and the tax credit qualifications, limitations, and claiming procedures. The complexity of the integrated tax

reporting and credit taking procedures may develop situations or questions which are not addressed herein. Such matters and requests for specialized rulings should be submitted to the department of revenue for prior determination before credits are claimed. Generally, prior determinations will be provided within sixty days after the department receives the information necessary to make such a ruling. Adverse rulings, tax credit denials, or tax assessments resulting from audits or other examinations of returns upon which the MATC is claimed may be administratively appealed under the provisions of chapter 82.32 RCW and WAC 458-20-100.

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON
FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	AFFIDAVIT OF FRED DANG IN RESPECT TO DETERMINATION OF MULTIPLE TAX CREDIT
Defendants.	)	
STATE OF WASHINGTON	)	
	)	ss.
County of Thurston	)	

FRED DANG, having been first duly sworn on oath, deposes and says:

1. I am a Revenue Auditor employed by the Washington State Department of Revenue and have served in that position during the times pertinent to this affidavit. I am over the age of eighteen, competent to testify in this matter, and have personal knowledge of all matters set forth in this affidavit.

2. In 1988 I conducted an excise tax audit of the plaintiff taxpayer identified under the terms of a protective order in this matter as No. 46. The audit of this taxpayer resulted from the Department of Revenue's usual audit

selection process and was conducted for the taxable periods January 1, 1984 through December 31, 1987.

3. During the course of audit I noted that no claim had been made by the taxpayer for the business and occupation multiple activities tax credit (MATC credit) for which the taxpayer might otherwise be eligible for the limited interval July 1, 1987 through December 31, 1987 included in my audit period.

4. In conducting the audit examination I determined that the taxpayer might be entitled to the MATC credit with respect to products manufactured within the state of Washington and which were subjected to selling gross receipts taxes in the states of Indiana and Hawaii.

5. For purposes of confirming the MATC credit allowable to the taxpayer I audited the existing records of the corporation as follows:

(a) I utilized a test period which contained portions of the months of October and November 1987.

(b) I then made reference to the taxpayer's existing records summarizing sales of manufactured products made into the various states including Indiana and Hawaii.

(c) From existing sales invoices and product numbers examined for the test period I determined that 54.65% of the product volume sold into Indiana was produced in Washington. I further determined that the comparable percentage for Hawaii sales from Washington manufacturing sources was 20.62%.

(d) I then calculated the Indiana and Hawaii taxes payable on this apportioned volume of sales within the two states from Washington sources, thereby producing the allowable MATC credit.

6. My audit was conducted by examining records compiled and maintained by the taxpayer for purposes other than the computation of the MATC credit. The MATC credit allowed for the Indiana tax as a result of my audit was $7,211. The credit was allowed for the period June through December 1987. On an annualized basis, this credit closely approximates

what the taxpayer has identified in paragraph 8 of its affidavit, which I have read, as its credit entitlement based upon a review of its "production, distribution and sales system" records. The MATC credit allowed for taxes paid to Hawaii, which are not mentioned in the taxpayer's affidavit, was $810.

/s/ Fred Dang
FRED DANG

SUBSCRIBED AND SWORN TO before me this 19th day of July, 1989.

/s/ LoRay W. Walker
NOTARY PUBLIC in and for the
State of Washington, residing
at Olympia.
My commission expires: 10-1-89

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON
FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	AFFIDAVIT OF LES JASTER IN RESPECT TO THE MULTIPLE ACTIVITIES TAX CREDIT
Defendants.	)	
STATE OF WASHINGTON	)	
	)	ss.
County of Thurston	)	

LES JASTER, having been first duly sworn on oath deposes and says:

1. I am a regional audit manager of the Washington State Department of Revenue and previously served as the supervisor of Audit Review for such agency. I am over the age of eighteen, competent to testify in this matter, and have personal knowledge of all matters set forth in this affidavit.

2. I have been employed by the Department of Revenue for approximately twenty-one years.

3. My responsibilities in the position of regional audit manager and supervisor of Audit Review require that I provide advice and instructions to the agency's tax auditors in

the administration and application of the Washington multiple activities credit (hereinafter the "MATC credit") which is allowed as a credit against Washington business and occupation taxes for certain gross receipts taxes paid to other states and jurisdictions. These responsibilities include the giving of similar advice and instructions to auditors in regard to the application of the Department of Revenue's administrative rule (WAC 458-20-19301) which implements the statutory credit.

4. In connection with the above-referenced action I have recently examined affidavits submitted by several of the plaintiffs herein which are generally titled "Affidavit Regarding Potential Claim for the Washington Multiple Activities Credit". Because of the protective order obtained by plaintiffs I am required to identify the corporate taxpayers submitting these affidavits by number rather than by name. I am informed and therefore believe that the court has been provided with an index to identify these taxpayers. The taxpayer affidavits which I have reviewed are as follows;

Taxpayer Nos.	4	15	34	50	64
	10	17	39	52	67
	11	18	46	56	57
	12	23	49	59	72

I have also reviewed the initial affidavits submitted by these taxpayers with the exception of two taxpayers which did not submit such initial affidavits.

5. A substantial number of the affidavits contain the same language which states that based upon the taxpayers' analysis of their production, distribution and sales records they believe themselves to be eligible for MATC credits, in amounts they specifically state, for gross receipts taxes paid to other jurisdictions. Such affidavits, however, proceed to say that the requirements of the law, as administered by the Department of Revenue preclude their claim of the MATC credit because the costs of "identifying, producing and preserving" the documentation required by the Department of Revenue significantly exceed the financial benefit of the credit. Certain

of the affidavits allege, in conclusionary fashion and without detail, the costs that would be incurred in setting up a unique accounting system to be able to claim such credits.

6. The representations contained in these affidavits misconstrue the requirements of the law for claiming credits as the law is administered by the Department of Revenue.

7. The recordkeeping requirements set forth in the Department's administrative rule (WAC 458-20-19301) pertain to records that a taxpayer generates in the ordinary course of business. The rule does not require the independent generation of records for the sole purpose of establishing qualification for the MATC credit.

8. The affidavits submitted by taxpayers further imply that the Department requires the exact tracing of any and all manufactured items from their place of origin to destination before consideration will be given to allowance of tax credit. This is inaccurate.

9. Further, the affidavits suggest that by reference to the records maintained by the taxpayers in the ordinary course of business relating to their production, distribution and sales systems, the taxpayers could calculate an appropriate MATC credit, but the Department's recordkeeping requirements and methods of administering the tax credit would disallow the benefit. This, too, is in error.

10. The Department will utilize records otherwise maintained by the taxpayer which may permit the tracing of goods to determine the movement from point of manufacture or extraction to sale for purposes of confirming the allowable MATC credit. The Department will analyze such records for a given taxpayer agreed upon by the Department and the taxpayer (e.g., one or more months) and apply the results of that test period to the entire audit period.

11. However, where existing or readily obtainable records do not permit the identification of specific products from their places of origin to ultimate destination, the Department is prepared to accept statistical evidence

maintained in the ordinary course of business as confirmation of the taxpayers' entitlement to credit.

12. For example, a manufacturing business can demonstrate from records it otherwise maintains that 10% of the products it manufactures outside of Washington is attributable to jurisdictions that impose a gross receipts manufacturing tax that would qualify as a credit against the tax imposed for sales made to Washington customers. The taxpayer's records further demonstrate that of its total production outside Washington, 5% of the production is sold into Washington. The taxpayer neither generates nor maintains records in the ordinary course of business to establish from which manufacturing sources the Washington products emanated and in what amounts. In such circumstances the Department would deem 10% of the Washington products to have had their origin in that jurisdiction imposing the gross receipts manufacturing tax which may be used as a credit against Washington's selling tax.

13. The administration of the rule in this manner for purposes of the MATC credit is consistent with the adjustments the Department allows in certain comparable situations exemplified by the following:

(a) Bad Debts (RCW 82.04.4284). A company can demonstrate from its existing records that a given percentage of its accounts receivable on a nationwide basis results in bad debts. It can determine from such records what portion of its accounts are generated in Washington, but has no records to demonstrate the exact dollar amount of Washington bad debts. The Department will allow a deduction for bad debts computed by applying the nationwide percentage to the known Washington accounts.

(b) Manufactured and Purchased Products. A Washington manufacturer is required from time to time to supplement its manufactured products by purchasing the same products in order to fulfill its sales commitments. It makes sales within and outside of Washington. If such purchased products are used to fill out-of-state orders, the taxpayer has no

obligation for Washington's selling business and occupation tax. Conversely, a selling tax will be paid on sales made in-state. Correspondingly, manufacturing tax must be paid with respect to products manufactured within the state and used to fill out-of-state orders. The taxpayer maintains no records in the ordinary course of business which show what specific products sold within and outside the state are attributable to the manufacturing and purchasing activities. In the absence of such records, the Department will not disallow an exemption from tax for some part of the out-of-state sale orders which may, in fact, have been filled by purchased products but will deem that result to have taken place by apportioning out-of-state sales by reference to the taxpayer's records of total manufacturing and purchasing activity.

14. The administration of the MATC credit by the Department of Revenue in the manner described in ¶¶ 10-12 of this affidavit is exemplified by recent audits of two plaintiff taxpayers who have filed affidavits concerning the multiple activities credit (taxpayer Nos. 15 and 46). The court is referred to the affidavits of Robert M. Beith and Fred Dang, filed concurrently with this affidavit, which describe the audits of these two taxpayers respectively.

15. Such use of existing records for purposes of supporting and confirming the entitlement to the MATC credits will not in my judgment necessitate the creation of unique and elaborate accounting systems alleged by the taxpayers in their affidavits nor the generation of additional accounting records designed solely for the purposes of establishing entitlement to the credit.

16. Having noted the representations contained in the affidavits of the taxpayers identified in ¶ 4, to the best of my knowledge the Department of Revenue has not required a taxpayer, including any of the plaintiffs, to establish a claim for the MATC credit by the introduction of a new accounting system or the separate development of records which would

require the identification or tracking of specific manufactured or extracted products from their place of origin to destination.

/s/ Les Jaster
LES JASTER

SUBSCRIBED AND SWORN TO before me this 20th day of July, 1989.

/s/ LoRay W. Walker
NOTARY PUBLIC in and for the
State of Washington, residing
at Olympia.

My commission expires: 10-1-89